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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 650

FUHRMAN & FORSTER COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of dismissal of the United States Processing Tax Board of Review, together with supporting and dissenting memoranda, is printed in the record at pages 53 to 57, inclusive. The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 87–94) is reported at 114 F. (2d) 863.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 22, 1940. (R. 94.) A petition

for rehearing was denied by the Circuit Court of Appeals on October 1, 1940. (R. 95.) The petition for a writ of certiorari was filed on December 26, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States Processing Tax Board of Review properly dismissed the petition for review for lack of jurisdiction.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and regulations involved are printed in the Appendix, *infra*, pp. 11–23.

STATEMENT

This proceeding was instituted before the United States Processing Tax Board of Review by a petition filed September 1, 1938 (R. 3–8), and an amended petition filed April 24, 1939 (R. 42–48), to review the disallowance by the Commissioner of Internal Revenue of petitioner's claim for refund of $260,675.15. This sum represents $258,086.02 paid to C. A. Burnette Company, a custom slaughterer, on account of processing taxes imposed upon the latter under the Agricultural Adjustment Act, c. 25, 48 Stat. 31, upon the slaughtering by C. A. Burnette Company of hogs owned by the petitioner, and $2,589.13 paid by petitioner directly to the Collector of Internal Revenue as processing taxes due

upon the slaughtering by the C. A. Burnette Company of hogs owned by the petitioner. (R. 42–43.) Upon motion by the Commissioner (R. 49–50), the Processing Tax Board of Review dismissed the proceeding before it for lack of jurisdiction, three members dissenting (R. 53–57). The Circuit Court of Appeals for the Seventh Circuit affirmed. (R. 87–94.)

Insofar as material here, the amended petition filed with the Processing Tax Board of Review (R. 42–48) alleges that the petitioner is an Illinois corporation organized January 2, 1920, with its principal office at Chicago; that its business is confined to the purchase and slaughter of hogs and the sale of the resultant pork products to wholesale and retail meat dealers, jobbers, hotels, restaurants, and others. (R. 43.)

Petitioner purchased the hogs on which the processing tax in controversy was paid. They were bought in the open market in the customary manner from commission houses or direct from the producer, or both. The petitioner's buyer selected the animals and otherwise settled the terms of purchase, the billing for which was to C. A. Burnette Company, a custom slaughterer. The C. A. Burnette Company always received the cash or charged the account of the petitioner, prior to actual payment, for the hogs purchased, on the following day. The C. A. Burnette Company slaughtered the hogs for a fee, usually under the super-

vision of the buyer employed by the petitioner. The employee who supervised the killing process had authority to require the work to be done by methods that were considered to be the most favorable to the petitioner. (R. 43.)

The tax imposed upon the slaughtering of the hogs slaughtered for the petitioner was at first paid by the petitioner directly to the Collector of Internal Revenue. Payments made by the petitioner later were refunded to the petitioner with instructions to pay C. A. Burnette Company. (R. 43.) Thereafter payment of the processing tax was made by C. A. Burnette Company on all of the hogs slaughtered for petitioner, and the petitioner was compelled to pay the amount of the tax to C. A. Burnette Company. The money thus collected from petitioner actually was used by C. A. Burnette Company to pay the processing tax on the hogs slaughtered for petitioner. Petitioner always paid the killing charge and the processing tax by separate checks and recorded the disbursements on its records as processing taxes paid. (R. 44–45.)

The only exception to this method of payment was the payment by petitioner of $2,589.13 directly to the Collector of Internal Revenue on July 1, 1935, on account of processing taxes due for the month of May, 1935. (R. 43–44.)

ARGUMENT

The Circuit Courts of Appeals have held without exception that Title VII of the Revenue Act

of 1936 authorizes refunds only to persons who actually paid to the Government amounts collected as tax under the Agricultural Adjustment Act. See *F. & F. Laboratories* v. *Commissioner,* 104 F. (2d) 563 (C. C. A. 7th); *Oswald Jaeger Baking Co.* v. *Commissioner,* 108 F. (2d) 375 (C. C. A. 7th), certiorari denied, 309 U. S. 683; *Zinsmaster Baking Co.* v. *Commissioner,* 109 F. (2d) 738 (C. C. A. 8th), certiorari denied, 310 U. S. 653; *New Consumers Bread Co.* v. *Commissioner,* 115 F. (2d) 162 (C. C. A. 3d). The issue is simply whether, under the circumstances of this case, the petitioner or the slaughterer was the taxpayer.

1. In its argument (Br. 19–39) petitioner attempts to show, contrary to the rulings of the Commissioner of Internal Revenue and the decision of the court below, that it, instead of C. A. Burnette Company, was the first domestic processor of hogs within the meaning of the Agricultural Adjustment Act and as such was liable for the tax involved—that C. A. Burnette Company only acted as its agent in making the payments.

The court below correctly held that C. A. Burnette Company was the first domestic processor and as such liable for the tax. This part of the court's decision is not in conflict with any other decision, but appears to be supported by the decisions in *Southwestern Serum Co.* v. *Commissioner,* 108 F. (2d) 843 (C. C. A. 10th), certiorari denied, 310 U. S. 628; *Grain Belt Supply Co.* v. *Commissioner,* 109 F. (2d) 490 (C. C. A. 8th),

certiorari denied, 310 U. S. 648; and *Arabi Packing Co.* v. *Commissioner,* 109 F. (2d) 278 (C. C. A. 5th), certiorari denied, 310 U. S. 645. See, also, Article 2 of Treasury Regulations 81, *infra,* promulgated under authority of the Agricultural Adjustment Act.

In the *Southwestern Serum Co.* case and the *Grain Belt Supply Co.* case the petitioners killed their own hogs by slitting the throat, drew off the blood for use in manufacturing anti-cholera serum, and sold the whole carcasses to Cudahy & Company. The Commissioner held that the killing of the hogs constituted the first domestic processing and collected the tax from the serum companies. Their right to sue for a refund was not questioned, but recovery was denied because they failed to show they bore the burden of the tax. In the *Arabi Packing Co.* case the petitioner was a custom slaughterer and its right to sue for a refund was not questioned. Its appeal was dismissed because the Processing Tax Board of Review was not given jurisdiction of claims for refund of amounts paid as processing taxes by custom processors, such jurisdiction having been vested in the District Courts and the Court of Claims.

Furthermore, the question whether the Commissioner was right or wrong in taxing C. A. Burnette Company as the first domestic processor is immaterial in this proceeding. The tax actually was paid by that company as its own liability and it

is recognized as the taxpayer for the purposes of Title VII of the 1936 Act. That Congress so intended is clear from the provisions of the Act. Section 906 of the Act, *infra,* gives concurrent jurisdiction to the District Courts and the Court of Claims of suits to recover all amounts paid as tax under the Agricultural Adjustment Act, except amounts paid as processing tax as defined in Section 913 (b); Section 906, *infra,* gives the Processing Tax Board of Review jurisdiction of claims for refund of amounts paid as processing tax; and Section 913 (b), *infra,* defines processing tax as used in Title VII as any exaction denominated a processing tax under the Agricultural Adjustment Act except any amount paid as tax with respect to the processing of a commodity for a customer for a charge or fee. Treasury Regulations 96, promulgated under authority of Section 916 of the 1936 Act, *infra,* give full effect to the provisions of the Act by providing for the filing of refund claims by custom processors. See Articles 101, 201, 501–505, of Regulations 96, *infra.*

2. Petitioner alleges that the decision below is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Trunz Pork Stores* v. *Rasquin,* 100 F. (2d) 399 (Pet. 6–7). In that case the Trunz Pork Stores, as did the petitioner in this case, purchased live hogs and had them slaughtered by a public abattoir for a charge or fee. For a time it paid the processing tax but

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later was advised that the slaughterer was liable for the tax, whereupon it filed a claim for refund of the amount which it had paid. Upon the expiration of six months without action having been taken by the Commissioner upon its claim, and without having filed a claim under the Revenue Act of 1936, it brought suit against the Collector of Internal Revenue in the District Court of the United States for the Eastern District of New York. The action was dismissed by the District Court for lack of jurisdiction (22 F. Supp. 1020), and its decision was affirmed by the Circuit Court of Appeals. The opinions of both courts indicate that the ground for dismissal was that the claim was for an amount paid as processing tax, over which the Processing Tax Board of Review is given exclusive jurisdiction.[1]

In the *Trunz* case, the Commissioner had failed to refund the tax to the packer, who had paid it as the taxpayer. In the circumstances of that case it would be difficult to hold that the slaughterer, who had in fact paid none of the tax in question was the taxpayer, and certainly the packer there was the actual taxpayer. Here, on the contrary,

[1] There were other factors which deprived those courts of jurisdiction. For one thing, the suit was brought against the Collector of Internal Revenue, contrary to the provisions of Section 910 of the 1936 Act, *infra*. See *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337. Then, again, it does not appear from either opinion that the taxpayer alleged that it had borne all or any part of the burden of the amount sued for as required by Section 902, *infra*.

the Commissioner had refunded the taxes to petitioner and had collected from the slaughterer. Petitioner, therefore, whatever the case with the Trunz Pork Stores, could not be viewed as the person from whom the tax was collected.

The only possible conflict between the *Trunz* decision and that below would be as to the $2,589.13 which petitioner paid directly to the Collector of Internal Revenue on July 1, 1935. The record does not explain whether this was an administrative oversight or a payment made, as agent or as volunteer, to avoid collection procedures directed against the slaughterer (see R. 43–44). Petitioner, in its "Reasons" makes only passing reference to this payment, and that in a different connection (Pet. 6–14, 13). This isolated payment, ignored in the reasoning of the Board of Review and the court below, does not seem to us to raise a conflict of decisions.

There is no conflict with the other decisions cited by petitioner. (Pet. 7–9.) None arose under Title VII of the Revenue Act of 1936. *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501, cited by petitioner (Pet. 8), involved the question whether the Steel Company was liable for a manufacturers excise tax. The same is true of *Warner-Patterson Co.* v. *United States*, 68 C. Cls. 237, cited by petitioner (Pet. 9). In *White* v. *Hopkins*, 51 F. (2d) 159 (C. C. A. 5th), and *Lucas* v. *Kentucky Distilleries & Warehouse Co.*, 70 F. (2d) 883 (C. C. A. 6th), the

suit was brought by the party who was charged with, and who actually paid, the taxes involved. The only analogy to the present case is with respect to the $2,589.13 paid by this petitioner on July 1, 1935, the circumstances of which are obscure.

CONCLUSION

There is no conflict of decisions. The decision below is fully supported by the facts and the law. The petition should be denied.

Respectfully submitted,

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